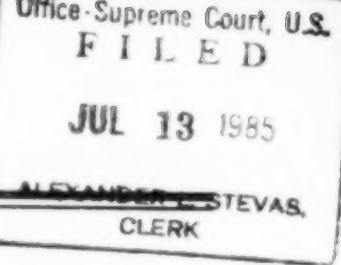


No. 84-1274



IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM,

v.

Petitioner,

DIMENSION FINANCIAL CORP., *et al.*,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit

BRIEF OF CONFERENCE OF STATE BANK
SUPERVISORS, FLORIDA BANKERS ASSOCIATION
AND OKLAHOMA BANKERS ASSOCIATION AS
AMICI CURIAE IN SUPPORT OF THE PETITIONER

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QUESTIONS PRESENTED

1. Whether the court below erred in holding, based upon the literal terms of Section 2(c) of the Bank Holding Company Act, that the Federal Reserve Board's regulation defining "bank" for purposes of the Act was invalid, where the record demonstrates that the Board's regulation is plainly consistent with congressional intent as manifested in the overall purposes of the Act and the legislative history of Section 2(c).

2. Whether the court below erred in holding that the Board exceeded its rulemaking authority under Section 5(b) of the Act, which empowers the Board to issue rules "to carry out the purposes of [the Act] and to prevent evasions thereof," where the Board specifically determined that its regulation was necessary to restrain the growth of so-called "nonbank banks" whose expansion threatened to evade, and thereby undermine, the purposes of the Act.

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AMICI CURIAE IN SUPPORT OF THE PETITIONER

INTEREST OF *AMICI CURIAE*

This brief is filed by the Conference of State Bank Supervisors (the "Conference"), the Florida Bankers Association and the Oklahoma Bankers Association (collectively, the "Associations"), with the consent of all parties,¹ in support of the Petitioner. The Conference is the professional association of state government officials responsible for regulating more than 10,000 state-chartered banking institutions, with total assets of approximately \$1 trillion, in the 50 states and in Guam, Puerto Rico and the Virgin Islands.² The Associations are mem-

¹ Letters indicating the consent of all parties to the filing of this brief have been filed with the Clerk.

² In 1958, the Conference invited state-chartered banks to become "associate members," and there are currently about 3,600 such associate members. Associate members, however, may not vote at meetings of the Conference and therefore do not vote on decisions or policies of the Conference.

bership organizations representing more than ninety percent of the commercial banks headquartered in Florida and Oklahoma, respectively.

The members of the Conference and the Associations have a vital interest in the outcome of this case. The decision of the court below would allow institutions known as "nonbank banks" to be acquired and operated by commercial organizations and bank holding companies without regard to the requirements of the Bank Holding Company Act, 12 U.S.C. §§ 1841-50 (the "BHC Act"). Since 1980, nonbank banks—which, purportedly, either do not accept demand deposits or do not make commercial loans—have proliferated across the country. These entities claim that they are not "banks" by virtue of the 1970 amendment to Section 2(c) of the BHC Act, 12 U.S.C. § 1841(c), which modified the definition of "bank" to include each institution which "accepts deposits that the depositor has a legal right to withdraw on demand" and "engages in the business of making commercial loans." Nonetheless, nonbank banks are chartered as banks and provide services identical to many of the services offered by full-service commercial banks.

The Conference and the Associations are particularly concerned about the manner in which both bank and nonbank holding companies have sought to establish nonbank banks across state lines without state permission, notwithstanding Section 3(d) of the BHC Act, 12 U.S.C. § 1842(d) (popularly known as the "Douglas Amendment"), which requires specific state authorization for each interstate acquisition of a deposit-taking bank.³ In addition, the operation of nonbank banks by organizations engaged in securities and other nonbanking activities would place commercial banks (such as those which are members of the Associations) at an unfair disadvan-

³ See Argument, Part I(A)(1), *infra*.

tage, since such banks and their parent bank holding companies are prohibited from engaging in many of the activities conducted by nonbanking organizations.

The Conference and the Florida Bankers Association have an additional, collateral interest in this case. The court below considered the legislative history of the 1970 amendment to Section 2(c) of the BHC Act and concluded that the amendment "permitted the development of the non-bank banks."⁴ Thus, the court *assumed* the lawfulness of nonbank banks and was only concerned with the permissible scope of their operations. Subsequently, however, the Eleventh Circuit Court of Appeals, in a case in which the foregoing *amici* were parties, reviewed the same legislative history and reached a very different conclusion—*viz.*, that the 1970 amendment was intended to exempt from the BHC Act only "a single intrastate institution [the Boston Safe Deposit and Trust Company]—or perhaps the very few entities similarly situated." *Florida Dept. of Banking & Finance v. Bd. of Governors of Fed. Reserve Sys.*, 760 F.2d 1135, 1142 (11th Cir. 1985). The Eleventh Circuit also considered the Douglas Amendment (a provision which the Tenth Circuit expressly *declined* to consider, 744 F.2d at 1410), and held that the 1970 amendment could *not* be construed to permit bank holding companies to establish deposit-taking nonbank banks across state lines without state authorization pursuant to the Douglas Amendment.

The Intervenor-Respondent in *Florida Dept. of Banking*, U.S. Trust Corporation, has indicated that it will petition this Court for a writ of certiorari. Only the Tenth Circuit's decision is before this Court and is argued in this brief. However, *amici* have an understandable concern with respect to the possible effect of this

⁴ *Dimension Financial Corp v. Bd. of Governors of Fed. Res. Sys.*, 744 F.2d 1402 (10th Cir. 1984), Appendix to Petition for Certiorari ("App.") 1a-19a, at 1407, App. 9a, *cert. granted*, 105 S.Ct. 2137 (1985).

Court's decision in the present case upon the Eleventh Circuit's decision.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. The Federal Reserve Board's Regulation

The court below held that the Federal Reserve Board (the "Board") acted beyond the scope of its authority under the BHC Act in adopting a definition of "bank" as part of the Board's revision of Regulation Y in January 1984.⁵ The Board defined "bank," for purposes of the BHC Act, to include every institution which engages in the twin functions specified by Congress in its 1970 amendment to Section 2(c) of the BHC Act, *viz.*, the acceptance of "demand deposits" and the making of "commercial loans."⁶ The Board defined "demand deposits" to include all deposit accounts payable in practice on demand and withdrawable by check or other negotiable instrument, and defined "commercial loans" to include all loans except those made to individuals for personal, family, household, or charitable purposes. The Board's definition of "commercial loans" included money market transactions such as the purchase of certificates of deposit and bankers' acceptances and the sale of federal funds.⁷

⁵ See Board Revision of Regulation Y, 49 Fed. Reg. 794, 818-19 (1984).

⁶ Section 2(c) of the BHC Act defines "bank," in pertinent part, as any institution "which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans." 12 U.S.C. § 1841(c).

⁷ The Board's definitions of "demand deposits" and "commercial loans" are as follows:

- (A) "Deposits that the depositor has a legal right to withdraw on demand" (hereinafter "demand deposits") means any deposit with transactional capability that, as a matter of practice, is payable on demand and that is withdrawable by check, draft, negotiable order of withdrawal or other similar instrument; and
- (B) "Commercial loans" means any loan other than a loan to an individual for personal, family, household, or charitable

The Board adopted broad definitions of the terms "demand deposits" and "commercial loans" in order to restrain the expansion of nonbank banks. The Board determined that these institutions were being acquired by nonbanking organizations and bank holding companies without compliance with the BHC Act's requirements. Although the Board did not go so far as to declare that nonbank banks were unlawful *per se*,⁸ the Board sought to restrict the area in which nonbank banks could operate. Relying upon its authority under Section 5(b) of the BHC Act to "prevent evasions" of the Act, the Board determined that its definitions were essential to prevent nonbank banks from evading two fundamental purposes of the Act—*viz.*, (1) the prohibition against interstate acquisitions of deposit-taking banks without state permission, and (2) the separation of banking from nonbanking enterprises.⁹

2. The Decision Below

In holding invalid the Board's definitions of "demand deposits" and "commercial loans," the Tenth Circuit relied primarily upon the literal meaning and "general . . . industry usage" of these terms as used in Section 2(c) of the BHC Act.¹⁰ The court concluded that Congress

purposes, and includes the purchase of retail installment loans or commercial paper, certificates of deposit, bankers' acceptances, and similar money market instruments, the extension of broker call loans, the sale of federal funds, and the deposit of interest-bearing funds.

49 Fed. Reg. at 818, *codified at* 12 C.F.R. § 225.2(a) (1).

⁸ As stated above, the Eleventh Circuit has recently held that nonbank banks are unlawful *per se* to the extent that they accept deposits and are established across state lines without state authorization pursuant to the Douglas Amendment. *Florida Dept. of Banking*, 760 F.2d at 1141-44.

⁹ See Supplementary Information, Appendix A to Board Revision of Regulation Y ("Board Appendix A"), 49 Fed. Reg. at 833-42, App. 20a-61a.

¹⁰ *Dimension*, 744 F.2d at 1404-07, App. 4a-9a. In holding invalid the Board's definition of "demand deposits," the court below relied entirely upon its earlier decision in *First Bancorporation v. Bd. of*

had not intended to give the terms of Section 2(c) any broader meaning and therefore rejected the Board's attempt to do so by regulation. Thus, the court's decision permits institutions chartered as banks and performing banking services to operate throughout the United States *without* compliance with the BHC Act, so long as they abstain either from accepting "demand deposits" or from making "commercial loans," as narrowly defined by the court.

The Tenth Circuit's decision is in error. By focusing only upon the literal meaning of the terms "demand deposits" and "commercial loans" in Section 2(c), the court overlooked the fundamental precept of statutory construction that a statute should *not* be interpreted in a manner which violates its essential purposes and therefore is "plainly at variance with the policy of the legislation as a whole."¹¹ The decision below utterly failed to consider the congressional purposes underlying the BHC Act, upon which the Board had expressly relied in adopting its regulation. The court did not even discuss the congressional policy of separation of banking from nonbanking enterprises. Moreover, the court specifically *refused* to consider the congressional mandate in the Douglas Amendment against interstate bank acquisitions without state authorization.¹²

The Tenth Circuit's decision is also contrary to another fundamental rule of statutory construction, *viz.*, that a statute should be construed in accordance with congressional intent as manifested in the legislative history.¹³ The court completely misread the legislative history.

Governors of Fed. Res. Sys., 728 F.2d 434 (10th Cir. 1984), *rev'g* 68 Fed. Res. Bull. 253 (1982).

¹¹ *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940), *quoting* *Ozawa v. United States*, 260 U.S. 178, 194 (1922). *See also* 2A Sutherland, *Statutes and Statutory Construction*, § 46.07 (C. Sands 4th ed. 1973).

¹² *See* notes 23-27, *infra*, and accompanying text.

¹³ *Train v. Colorado Pub. Int. Research Group*, 426 U.S. 1, 9-10 (1976); 2A Sutherland, *supra* note 11, at § 48.01 *et seq.*

tory of the 1966 and 1970 amendments to Section 2(c) of the BHC Act, which defined "bank" in terms of the "demand deposit" and "commercial loan" tests.

The court focused upon the literal terms of the 1966 amendment while ignoring the clear intent of Congress to include within the term "bank" every institution which accepts deposits subject to the practical ability of the depositor to withdraw funds by check or other negotiable instrument. Similarly, the court's conclusion that the 1970 amendment was broadly intended to exempt all banks which do not make "commercial loans," as that term is generally understood in the financial industry, is totally inconsistent with the relevant legislative history. That history shows that the 1970 amendment was a technical amendment understood by both Congress and the Board to apply *only* to a *single institution* (the Boston Safe Deposit and Trust Company) or perhaps a very few similar entities.¹⁴ Nothing in the legislative history even remotely suggests that Congress contemplated in 1970 that, more than a decade later, owners of nonbank banks could seize upon the 1970 amendment to justify their creation of a new hybrid banking institution operating across state lines without state authorization and often controlled by nonbanking organizations.

Finally, the court below erred in holding that Section 5(b) of the BHC Act did not authorize the Board to adopt its definition of "bank." Section 5(b) authorizes the Board not only to "carry out the purposes" of the BHC Act but also to "prevent evasions thereof." Having determined that nonbank banks were evading the purposes of the Act, the Board was not only authorized but required to take action to prevent such evasion.¹⁵

¹⁴ *Florida Dept. of Banking*, 760 F.2d at 1140-42. *See also* notes 37-40, *infra*, and accompanying text.

¹⁵ *Wilshire Oil Co. v. Bd. of Governors of Fed. Res. Sys.*, 668 F.2d 732, 738-39 (3d Cir. 1981), *cert. denied*, 457 U.S. 1132 (1982); *Florida Dept. of Banking*, 760 F.2d at 1143-44.

In view of the "substantial deference" to which the Board was entitled under the decisions of this Court,¹⁶ the court below clearly erred in rejecting the Board's factual determinations as to the likely effect of the activities of nonbank banks and the manner in which the Board should carry out its obligations under Section 5(b).¹⁷

ARGUMENT

I. THE DECISION BELOW IS CONTRARY TO THE PURPOSES AND LEGISLATIVE HISTORY OF THE BANK HOLDING COMPANY ACT

A. The Court Below Failed to Consider the Purposes of the BHC Act

This Court has repeatedly affirmed that a statute should not be interpreted in a manner which violates its basic purposes.¹⁸ The court below therefore erred in striking down the Board's regulation, because its decision is contrary to the central purposes of the BHC Act upon which the Board expressly relied.

1. The Purposes of the BHC Act

Congress sought to accomplish three major purposes when it passed the BHC Act in 1956. First, in Section 3 of the BHC Act, Congress sought to prevent the concentration of banking resources within a particular area which could result if bank holding companies continued to have an "unrestricted ability" to acquire additional banks.¹⁹ Second, in Section 4 of the BHC Act, Congress sought to restrain the "combination under single con-

¹⁶ E.g., *Securities Industry Ass'n v. Bd. of Governors of Fed. Res. Sys.*, 104 S.Ct. 3003 (1948) ("*Schwab*") at 3009.

¹⁷ *Mourning v. Family Publications Serv.*, 411 U.S. 356, 369-71 (1973).

¹⁸ E.g., *American Trucking Ass'n*, 310 U.S. at 543; *Perry v. Commerce Loan Co.*, 383 U.S. 392, 399-400 (1966).

¹⁹ S. Rep. No. 1095, 84th Cong., 1st Sess. (1955), reprinted in [1956] U.S. Code Cong. & Ad. News 2482-83 (quoting testimony of Chairman W. M. Martin, Jr. of the Board).

trol of both banking and nonbanking enterprises, permitting departure from the principle that banking institutions should not engage in business wholly unrelated to banking."²⁰ To accomplish this purpose, Congress imposed strict limitations upon the ability of bank holding companies to engage in nonbanking activities.²¹

Finally, in the Douglas Amendment, adopted as Section 3(d) of the Act, Congress prohibited "the creation of interstate deposit-taking networks by bank holding companies without specific state authorization." *Florida Dept. of Banking*, 760 F.2d at 1141.²² The Douglas

²⁰ S. Rep. No. 1095, *supra* note 19, [1956] U.S. Code Cong. & Ad. News at 2483 (quoting testimony of Chairman W. M. Martin, Jr. of the Board).

²¹ In adopting the BHC Act, Congress intended to break up interstate conglomerate bank holding companies such as Transamerica Corp. In 1956, Transamerica controlled banks in ten states as well as extensive insurance and manufacturing enterprises. See 102 Cong. Rec. 6755 (1956) (remarks of Senator Robertson); *id.* at 6858 (remarks of Senator Douglas); *id.* at 6935-36 (remarks of Senator Fulbright). The Senate specifically rejected a proposed amendment which would have permitted Transamerica and other bank holding companies to retain the nonbanking assets which they held in 1956. *Id.* at 6933-41.

²² In adopting the Douglas Amendment, Congress was responding to the efforts of bank holding companies to avoid the branching restrictions of the McFadden Act by acquiring numerous banks both within and across state lines. *Northeast Bancorp, Inc. v. Bd. of Governors of Fed. Res. Sys.*, 53 U.S.L.W. 4699, 4702 (U.S. June 10, 1985). The McFadden Act, 12 U.S.C. § 36, prohibits national banks from branching across state lines and allows them to branch within their home state only to the extent permitted to state banks by state law.

Senator Douglas emphasized that his Amendment would apply the policy of the McFadden Act to bank holding companies and thereby prevent the formation of interstate deposit-taking networks such as those which had been created prior to 1956 by Transamerica (whose banks controlled a majority of the total bank deposits in Nevada and substantial deposits in several other states) and by First Bank Stock Corp. and Northwest Bancorporation (which together controlled 55 percent of the total bank deposits in Minnesota, 44 per-

Amendment bars any bank holding company located in one state from acquiring a bank in another state without the specific statutory authorization of the latter state, and thereby ensures that each state can "retain local, community-based control over banking." *Northeast Bancorp.*, 53 U.S.L.W. at 4702-03.

2. *The Tenth Circuit's Failure to Apply the Purposes of the BHC Act*

The court below failed to consider the congressional purposes upon which the Board had expressly relied in adopting its regulation. The court's failure in this regard is astonishing in view of the Board's specific finding that the expansion of nonbank banks since 1980 threatened to "undermine the system of bank holding company regulation as a whole."²³

In its notice of final rulemaking, the Board pointed out that nonbank banks were being operated by commercial organizations in contravention of the BHC Act's policy of separation between banking and nonbanking activities, and were also being acquired across state lines in violation of the Douglas Amendment's policy against interstate banking without state permission.²⁴ Accordingly,

cent of those in Montana, and nearly one-third of those in North and South Dakota). 102 Cong. Rec. 6858-60 (1956).

²³ Board Appendix A, 49 Fed. Reg. at 835, App. 27a.

²⁴ See *id.*, 49 Fed. Reg. at 833-36, App. 20a-31a.

The Board's regulation was particularly aimed at acquisitions of nonbank banks such as those proposed by The Dreyfus Corporation and Dimension Financial Corporation. Dreyfus, a nonbanking organization engaged in the underwriting and sale of securities, sought to acquire nonbank banks in both New Jersey and New York. See letters dated Dec. 10 and Dec. 16, 1982, from W. Wiles, Secretary of the Board, to W. Isaac, Chairman of the Federal Deposit Ins. Corp. ("FDIC") and J. Diamond, counsel to Dreyfus, Rec. 1014D and 1014F ("Dreyfus Letters"). Dimension, a nonbank holding company affiliated with a thrift institution, proposed to establish 31 chartered national banks in 25 states, to be operated as nonbank banks. See Decision of the Comptroller of the Currency, dated May 9, 1984, on Applications of Dimension to Charter 31 National Banks in

the Board concluded that its adoption of broadened definitions of "demand deposits" and "commercial loans" was necessary to prevent nonbank banks from evading the basic purposes of the BHC Act.²⁵

The Tenth Circuit, however, did not even discuss the Act's policy of separating banking from nonbanking enterprises. Moreover, the court expressly *refused* to consider the Douglas Amendment's purpose of prohibiting interstate deposit-taking networks without state approval, even though it recognized that the Douglas Amendment "is a significant factor in the mix of state and federal regulation." 744 F.2d at 1410, App. 17a-18a.

The Tenth Circuit instead focused upon the literal terms of Section 2(c)'s reference to "demand deposits," and looked to "general . . . industry usage" in determining the meaning of "commercial loans."²⁶ However, this Court has held that the literal or general meaning of terms used in a statute should *not* be applied where, as in this case, such an approach would lead to a result "plainly at variance with the policy of the legislation as a whole."²⁷ In contrast to the Tenth Circuit's mecha-

²⁵ States, reprinted in 3 Quarterly Journal of the Office of the Comptroller of the Currency, No. 3, at 68, 69.

According to the Board's staff, nonbanking organizations currently own, or propose to acquire, 70 FDIC-insured nonbank banks and 30 uninsured nonbank banks. 1985 Board Staff Analysis submitted to House Committee on Banking, Finance and Urban Affairs, reprinted in "Nonbank Banks—Another List," 4 Bank. Expansion Rep. No. 12, at 12-18.

²⁶ Board Appendix A, 49 Fed. Reg. at 835-36, App. 27a.

²⁷ 728 F.2d at 436, 744 F.2d at 1403-07. Despite its stated reliance upon "industry usage," the Tenth Circuit ignored the fact that the American Bankers Association and the Independent Bankers Association of America, two of the largest bank trade associations, supported the Board's definition of "commercial loans" and did *not* challenge the Board's definition as being contrary to "industry usage." See Board Appendix A, 49 Fed. Reg. at 834, App. 21a.

²⁸ *American Trucking Ass'ns*, 310 U.S. at 543. See also *Wilshire Oil Co.*, 668 F.2d at 735-36; *Florida Dept. of Banking*, 760 F.2d at 1138-39.

nistic approach, this Court has made it clear that the "legislative intent" and "policy" of Congress are the critical factors in determining whether the Board's regulations are consistent with its statutory mandate.²⁸

B. The Court Below Misperceived the Legislative Intent of the 1966 and 1970 Amendments to the BHC Act

The decision of the court below is also contrary to the rule of statutory construction requiring that a statute be construed in accordance with congressional intent as manifested in the relevant legislative history.²⁹ In fact, the Tenth Circuit completely misread the legislative intent of the 1966 and 1970 amendments to the definition of "bank" in Section 2(c) of the BHC Act.

1. The Legislative History of the 1966 and 1970 Amendments Demonstrates that Congress Did Not Intend to Authorize a Broad Class of Non-bank Banks Which Could Be Operated in Contravention of the BHC Act's Purposes

When it passed the BHC Act in 1956, Congress intended that each holding company which acquired two or more institutions *chartered as banks* would be subject to regulation under the Act. Section 2(c) of the 1956 Act defined "bank" to include "any national banking association or state bank, savings bank, or trust company."³⁰

²⁸ *Schwab*, 104 S. Ct. at 3009 and n.16.

²⁹ *Train*, 426 U.S. at 9-10; 2A Sutherland, *supra* note 11, at § 48.01 *et seq.* In contrast to the Tenth Circuit's emphasis on literal interpretation, this Court has held that the literal terms of a statute are conclusive as to its meaning *only* where there is no legislative history to indicate the meaning which Congress actually intended. Compare *Train*, 426 U.S. at 9-10, with *Sedima, S.P.R.L. v. Imrex Co.*, 53 U.S.L.W. 5034, 5038 n.13 (U.S. July 1, 1985). In this case, as shown below, there is abundant legislative history which contradicts the Tenth Circuit's literal interpretation of Section 2(c) of the BHC Act.

³⁰ Act of May 9, 1956, c. 240, § 2(c), 70 Stat. 133. See S. Rep. No. 1095, *supra* note 19, [1956] U.S. Code Cong. & Ad. News at 2486, 2489.

The primary purpose of the 1966 amendment to the BHC Act was to extend the scope of the Act and the Board's jurisdiction thereunder. Congress did so by repealing the 1956 Act's exemptions for regulated investment companies, long term trusts, and charitable organizations.³¹

In the 1966 amendment, Congress also modified the definition of "bank" in Section 2(c) to include "any institution that accepts deposits that the depositor has a legal right to withdraw upon demand" ³² A functional demand deposit test was thereby substituted for the original charter test, in order to exclude non-deposit trust companies, savings banks and industrial banks which did not offer deposit accounts subject to withdrawal on demand by check.³³ As explained by the Senate Banking Committee, the 1966 amendment was intended to include within the scope of the BHC Act every institution which "accepts deposits payable on demand (*checking accounts*), the commonly accepted test of whether an institution is a commercial bank."³⁴

³¹ S. Rep. No. 1179, 89th Cong., 2d Sess. (1966), reprinted in [1966] U.S. Code Cong. & Ad. News 2385 at 2386-89. The repeal of these exemptions brought the Alfred I. DuPont trust (which controlled 30 banks in Florida) and Financial General Corp. (an investment company which controlled 21 banks in 5 states and the District of Columbia) within the scope of the Act. *Id.* at 2387-89.

³² Act of July 1, 1966, Pub. L. No. 89-485, § 3, 80 Stat. 235, 236.

³³ Savings banks and industrial banks did not have authority in 1966 to accept deposits subject to withdrawal by check. This authority was not generally given to such institutions until they were authorized in 1980 to accept negotiable order of withdrawal ("NOW") accounts. See S. Rep. No. 368, 96th Cong., 1st Sess. 2, 5-7 (1979), reprinted in [1980] U.S. Code Cong. & Ad. News 236, 238, 240-42. See also notes 47-48, *infra*, and accompanying text.

³⁴ S. Rep. No. 1179, *supra* note 31, [1966] U.S. Code Cong. & Ad. News at 2391 (emphasis added). See also 112 Cong. Rec. 12385 (1966) (remarks of Senator Robertson) (1966 amendment would include institutions which "accept demand deposits subject to check").

The 1970 amendment to the BHC Act further expanded the coverage of the Act, by bringing one-bank holding companies within its scope. Congress took this step in response to two developments which had occurred since 1966. First, the nation's six largest banks had organized one-bank holding companies which combined the business of banking with various nonbanking activities which were not permitted under Section 4 of the BHC Act. Second, large nonbanking organizations were acquiring single banks. Congress therefore decided to regulate one-bank holding companies under the BHC Act in order to maintain its "long-standing policy of separating banking from commerce."³⁵

As part of the 1970 amendment, Congress again modified the definition of "bank" in Section 2(c). The 1970 amendment retained the 1966 amendment's definition of "bank" as any institution which "accepts deposits that the depositor has a legal right to withdraw on demand", while adding a new provision that such an institution "engages in the business of making commercial loans."³⁶

The legislative history reveals that both the Board and Congress understood the 1970 amendment to Section 2(c) to be a technical provision of extremely limited application. The amendment was introduced on the floor of the Senate, without explanation, by Senator Brooke of Massachusetts.³⁷ However, the pertinent legislative history indicates that there was *only one* banking institution, the Boston Safe Deposit and Trust Company ("Boston Safe"), which was known by Congress to have been exempted from the BHC Act under the amended definition. Governor Robertson of the Board advised the Senate Banking and Commerce Committee that the amend-

³⁵ S. Rep. No. 1084, 91st Cong., 2d Sess. (1970), reprinted in [1970] U.S. Code Cong. & Ad. News 5519, 5520-22. See also 116 Cong. Rec. 14818-19 (1970) (remarks of Senator Brooke).

³⁶ Act of Dec. 31, 1970, Pub. L. No. 91-607, § 101(c), 84 Stat. 1760, 1761.

³⁷ 116 Cong. Rec. 14818-21 (1970) (remarks of Senator Brooke).

ment "would have very limited application at present, possibly affecting only one institution."³⁸ Similarly, Representative Gonzalez, a member of the House Banking and Currency Committee, identified Boston Safe as "[v]irtually the only bank which does no commercial lending."³⁹ Thus, the legislative record is devoid of any indication that Congress intended to authorize a broad class of "nonbank banks" which could be operated by holding companies without regard to the requirements of the BHC Act.

In *Florida Dept. of Banking*, the Eleventh Circuit reviewed the legislative history of the 1970 amendment and concluded that the amendment was narrowly intended to exempt Boston Safe, "a single intrastate institution—or perhaps the very few entities similarly situated—which could be excluded from regulation under the Act without giving rise to the kind of abuses which the Douglas amendment was designed to prevent." 760 F.2d at 1142. The Court viewed the 1970 amendment as "a bit of local favoritism on the part of Senator Brook[e] of Massachusetts" which was intended "to exempt a valued local institution without affecting other commercial banks." *Id.* at 1140 n.10.

Moreover, the House conferees on the 1970 amendment agreed to the modified definition of "bank" only after instructing the Board to construe the exemption for banks not making commercial loans "as narrowly as possible in order that all bank holding companies which should be covered under the Act in order to protect the

³⁸ *One-Bank Holding Company Legislation of 1970: Hearings on S. 1052, et al., before the Senate Committee on Banking and Currency, 91st Cong., 2d Sess. 136-37 (1970).*

³⁹ 116 Cong. Rec. 25848 (1970) (quoting from the *National Journal* of July 18, 1970). Representative Gonzalez also advised the House that "[t]he effect of the amendment is to exempt the Boston Co. [the parent holding company of Boston Safe] from the bill." *Id.* Significantly, Representative Gonzalez did *not* identify any other holding companies which would be exempted.

public interest will, in fact, be covered.”⁴⁰ Thus, there is not a shred of evidence in the legislative record to indicate that the literal terms of the narrow 1970 amendment should be construed to repeal the long-standing congressional policies requiring the separation of banking from commerce and preventing the creation of interstate deposit-taking networks without state permission. Congress neither intended nor contemplated that the 1970 amendment could be used by owners of nonbank banks to effect a sweeping revolution in bank structure and regulation.

2. The Tenth Circuit Misinterpreted the Relevant Legislative History

When the decision of the court below is compared against the applicable legislative history, it is clear that the court completely misconstrued the intent of the 1966 and 1970 amendments to Section 2(c). First, the court focused only on the literal terms of the 1966 amendment. It therefore seized upon the alleged fact that NOW account holders do not have a “legal right of withdrawal on demand” to justify its conclusion that NOW accounts are not “demand” deposits.⁴¹

The Tenth Circuit, however, overlooked the intent of Congress in 1966 to treat *checking accounts* as the “commonly accepted test,” and therefore the most important

⁴⁰ Conf. Rep. No. 1747, 91st Cong., 2d Sess. (1970), reprinted in [1970] U.S. Code Cong. & Ad. News 5561, 5573-74 (statement of House conferees). Although certain Senate conferees objected to the statement of the House conferees, their objections were not directed to the House conferees’ instruction to the Board concerning the Section 2(c) “exemption.” See 116 Cong. Rec. 42422, 42432-33 (remarks of Senators Sparkman and Bennett).

The statements of the House conferees, the Board, and Representative Gonzalez should be given decisive weight where; as here, the 1970 amendment’s proponent (Senator Brooke) was completely silent and did not attempt to refute the statements by other members of Congress. *Arizona v. California*, 373 U.S. 546, 583 n.85 (1963).

⁴¹ See *First Bancorporation*, 728 F.2d at 435 (emphasis added); *Dimension*, 744 F.2d at 1404, 1411, App. 4a, 18a.

indicia, of whether an institution should be regulated as a “bank” under the BHC Act.⁴² The Third Circuit Court of Appeals, in contrast to the Tenth Circuit, has held that Congress’ emphasis upon checking accounts indicates that Congress was concerned with the ability of depositors “in practice to withdraw [their deposits] on demand.”⁴³

The Tenth Circuit itself acknowledged that withdrawals from NOW accounts “are in practice permitted on demand.” The court also recognized that depositors can withdraw funds from NOW accounts by means of negotiable instruments. *First Bancorporation*, 728 F.2d at 435-36. Thus, the court’s own findings reveal that NOW accounts *do* have the features upon which Congress focused in the 1966 amendment—namely, the practical ability of the depositor to withdraw funds on demand by means of a negotiable instrument such as a check.⁴⁴

The Tenth Circuit also misread the legislative history of the 1970 amendment to Section 2(c). While acknowledging that Boston Safe was the only “example” given to Congress of the type of bank which would be exempted by the 1970 amendment, the Tenth Circuit nonetheless stated that “[t]he Act itself with the clearly expressed definitions permitted the development of the non-bank banks.” 744 F.2d at 1407, App. 9a. The court admitted that Congress had been advised that the 1970 amendment would have a “limited impact,” but dismissed this fact by saying that such advice was merely a “pre-

⁴² See note 34, *supra*, and notes 46-48, *infra*, and accompanying text.

⁴³ *Wilshire Oil Co.*, 668 F.2d at 737 (emphasis in original).

⁴⁴ Indeed, the Court’s rigid insistence upon the depositor’s “legal right” to withdraw funds on demand would prevent even conventional-checking accounts from being treated as “demand deposits,” since there are certain situations (*e.g.*, the insolvency of the bank) in which the holders of such accounts would *not* have a “legal right” to withdraw funds on demand. See, *e.g.*, 12 U.S.C. §§ 197a, 206, 1821(f).

diction" which proved to be incorrect. Accordingly, the court held that nonbank banks could not be considered as "evasions" of the BHC Act. *Id.*

Contrary to the Tenth Circuit's position, it is clear that Congress intended the 1970 amendment to be a technical provision of extremely limited application which would exempt *only* Boston Safe and perhaps a few similar intrastate institutions. The House conferees specifically instructed the Board to construe the exemption "as narrowly as possible," an instruction which the court below ignored.⁴⁵ The court also failed to consider the adverse impact which *its* interpretation of the 1970 amendment would have upon the congressional policies requiring the separation of banking from commerce and prohibiting the acquisition of deposit-taking banks across state lines without state permission. Finally, the court's broad interpretation of the 1970 amendment is contradicted by the much narrower construction of the Eleventh Circuit in *Florida Dept. of Banking*, which is fully consistent with the legislative history.

C. The Board Correctly Applied the Intent and Purposes of the BHC Act in Adopting Its Definition of "Bank" in Regulation Y

The Board correctly analyzed the purposes of the BHC Act, as well as the relevant legislative history, when it adopted its definition of "bank" in Regulation Y. First, the Board defined "demand deposits" to accomplish the same goal that Congress intended in adopting its 1966 amendment—namely, to ensure that all banking institutions which accept checking accounts or similar transaction accounts will be regulated as "banks" under the BHC Act. The Board determined that NOW accounts and other "transaction accounts" (all of which did not exist in 1966) are in practice payable on demand and therefore are the functional equivalents of checking accounts. The Board therefore concluded that there would be a serious potential for evasion of the BHC Act unless institutions

⁴⁵ See notes 37-40, *supra*, and accompanying text.

offering transaction accounts and extending commercial credit were brought within the definition of "bank."⁴⁶

The Board's inclusion of transaction accounts within its definition of "demand deposits" is consistent with congressional intent as manifested in the 1966 amendment to Section 2(c). As the Third Circuit pointed out in *Wilshire Oil*, 668 F.2d at 736-37, the 1966 amendment focused upon checking accounts, which were payable in practice upon demand, as the "commonly accepted test" of banking. *Accord, Florida Dept. of Banking*, 760 F.2d at 1139, 1142. In light of the intent of the 1966 amendment, it is significant that, when Congress authorized NOW accounts in 1980, it viewed such accounts as being "in effect . . . interest bearing checking accounts."⁴⁷ Indeed, Congress provided that bank reserves would be required with respect to such accounts (as well as other transaction accounts) to the same extent as reserves are required for conventional demand checking deposits.⁴⁸

⁴⁶ Board Appendix A, 49 Fed. Reg. at 836-39, App. 32a-45a. See also *First Bancorporation*, 68 Fed. Res. Bull. at 253-54.

⁴⁷ S. Rep. No. 368, *supra* note 33, at 7, [1980] U.S. Code Cong. & Ad. News at 242-43.

⁴⁸ Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, §§ 103 (*amending* 12 U.S.C. § 461(b)(1)(C) and (2)) and 303 (*amending* 12 U.S.C. § 1832(a)), 94 Stat. 132, 133-34 and 146. In contrast to transaction accounts, *different* levels of reserves are required for "nonpersonal time deposits" and *no* reserves are required for personal savings accounts. See *id.* at § 103.

Congress did exempt NOW accounts from the prohibition in 12 U.S.C. §§ 371a, 1828(g) and 1832(a) against the payment of interest on demand deposit accounts. However, the exemption of NOW accounts from treatment as demand deposits was *only* for the purposes of this prohibition, and Congress otherwise believed that such accounts *were* demand deposits. S. Rep. No. 368, *supra* note 33, at 2, 5-7, 20, [1980] U.S. Code Cong. & Ad. News at 238, 240-43 and 256. It is significant that Congress did *not* exempt NOW accounts from treatment as demand deposits either for purposes of the reserve requirements under 12 U.S.C. § 461(b) or for purposes of Section 2(c) of the BHC Act.

Second, the Board correctly recognized the very limited scope of the exemption to Section 2(c) created by the 1970 amendment. The Board's broad definition of "commercial loans" is consistent with the specific instruction of the House conferees that the exemption be construed "as narrowly as possible" to prevent evasions of the Act.⁴⁹ Indeed, because a primary objective of Congress in adopting the BHC Act in 1956, and amending it in 1966 and 1970, was to control companies which use deposits to provide commercial credit, the Board's definition properly covers all types of transactions, including money market transactions, in which credit is extended for a business purpose.⁵⁰

The Board's decision to adopt the broadest possible definition of "commercial loans" was based upon its finding that, since 1980, the policies of the BHC Act had been undermined by various banking and nonbanking organizations which were establishing nonbank banks to exploit a purported "loophole" in the Act, based upon a literal reading of Section 2(c).⁵¹ In this environment, the Board reasonably determined that changed circumstances since 1980 required it to adopt a definition of "commercial loans" which would prevent continued evasions of the policies of the BHC Act.⁵²

Indeed, the Board's definition of "commercial loans" did not represent a radical departure from its earlier interpretations of the 1970 amendment to Section 2(c). In those earlier decisions, the Board expressly stated that the term "commercial loans" included all loans other

⁴⁹ Board Appendix A, 49 Fed. Reg. at 834, 839, App. 23a-24a, 47a. See also the Dreyfus Letters, *supra* note 24.

⁵⁰ The Board specifically found that nonbank banks could use money market transactions, such as the purchase of certificates of deposit and bankers' acceptances and the sale of federal funds, as effective substitutes for other types of commercial loans. Board Appendix A, 49 Fed. Reg. at 834-36, 839-42, App. 22a-31a, 45a-61a.

⁵¹ See notes 23-25, *supra*, and accompanying text.

⁵² Board Appendix A, 49 Fed. Reg. at 834-36 App. 22a-31a.

than those made to an individual for personal, household, or charitable purposes. The Board also made clear that its decision to permit a few institutions to engage in money market transactions, without being deemed to have made commercial loans, was limited to the special facts of those institutions and was subject to change.⁵³ Thus, the financial industry had been on notice since the early 1970's that the Board might adopt a broad definition of "commercial loans" which would embrace money market transactions. Even if the Board's action could be considered a substantive departure from its earlier decisions, this Court has upheld the discretionary authority of a regulatory agency to modify its position in response to changed conditions.⁵⁴

In sum, the Board's definitions of "demand deposits" and "commercial loans" are consistent with the purposes and intent of the BHC Act, and represent a rational response to the threat posed by the proliferation of nonbank banks.⁵⁵ Therefore, the Board's definitions should be upheld.

⁵³ See, e.g., Letter dated May 18, 1972, from the Board to L. J. Aubrey of the Federal Reserve Bank of Boston regarding Boston Safe Deposit and Trust Co., Rec. 1041R; Letter dated May 28, 1981 from the Board to R. S. Miller, Jr., of Chrysler Corp., reprinted in [1981-82] Fed. Bank. L. Rep. ¶ 98,770.

⁵⁴ In *American Trucking Ass'n v. Atchison, Topeka & Santa Fe Railway*, 387 U.S. 397, 416 (1967), this Court said:

Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.

Accord, Permian Basin Area Rate Cases, 390 U.S. 747, 784 (1968).

⁵⁵ It should be noted that the Board's Regulation Y, because of its general scope, does not address every possible evasion of the BHC Act by nonbank banks. For example, following the Board's adoption of Regulation Y, the Board reluctantly permitted a New York bank holding company to establish a deposit-taking nonbank bank (which agreed not to make any "commercial loans" as defined

II. THE TENTH CIRCUIT MISCONSTRUED THE AUTHORITY OF THE FEDERAL RESERVE BOARD UNDER SECTION 5(b) OF THE BANK HOLDING COMPANY ACT

In striking down Regulation Y, the Tenth Circuit completely misconstrued the scope of the Board's rulemaking authority under Section 5(b) of the BHC Act. The court's pronouncement (744 F.2d at 1408, App. 12a) that the "authority of the Board under the Act is to be exercised in a restricted area [and] [i]t does not have the broad scope to work in as do many other agencies" is utterly inconsistent with the explicit terms of Section 5(b) and the broad construction of the Board's authority by this Court and by other Courts of Appeal.

A. The Board Has Been Granted Broad Authority to Implement and Interpret Federal Banking Law Generally and the BHC Act in Particular

The Federal Reserve System is central to the functioning of our economic and monetary system.⁵⁶ In order to administer this system, the Board has been given broad statutory authority and administrative flexibility to carry out the purposes of Federal banking laws, which authority has been consistently recognized by this Court. As stated in *Securities Industry Association v. Bd. of Governors of Fed. Reserve Sys.*, 104 S.Ct. 2979 (1984)

in Regulation Y) in Florida, without Florida's authorization. *U.S. Trust Corp.*, 70 Fed. Res. Bull. 371 (1984). Within a short time thereafter, bank holding companies filed applications to establish hundreds of deposit-taking nonbank banks across state lines in reliance upon this alleged loophole left by Regulation Y.

The Eleventh Circuit, however, struck down the Board's *U.S. Trust* order in its decision in *Florida Dept. of Banking*. The Eleventh Circuit held that the Board should have denied *U.S. Trust's* application to acquire the Florida deposit-taking bank (even though it technically complied with Regulation Y), because the application violated the clear purpose of the Douglas Amendment. 760 F.2d at 1141-44.

⁵⁶ E. Symons, Jr. & J. White, *Banking Law* 48 (1984).

("Bankers Trust") at 2983: "The Board is the agency responsible for federal regulation of the national banking system. . . ."

Beyond its general authority to supervise the nation's financial and monetary system, the Board has been expressly charged by Congress with implementing the BHC Act and ensuring that its purposes are carried out. The scope of the Board's authority to carry out that responsibility is explicitly set forth in Section 5(b) of the BHC Act:

The Board is authorized to issue such regulations and orders as may be necessary to enable it to administer and carry out the purposes of [the BHC Act] and prevent evasions thereof.

12 U.S.C. 1844(b) (emphasis added).

The broad delegation to the Board under Section 5(b) is in two parts. First, Congress empowered the Board to "issue such regulations and orders as may be necessary to enable it to administer and carry out the purposes of this chapter . . ." This language is consistent with the authority generally delegated to agencies under many acts. Second, Congress *specifically directed* the Board to use its regulatory authority to "prevent evasions" of the Act. Congress thus invested the Board with broad power to see that the purposes of the BHC Act are not frustrated.⁵⁷

In *Mourning v. Family Publications Service*, 411 U.S. 356 (1973), this Court dealt with the Truth in Lending

⁵⁷ Although the Board is granted broad authority under Section 5(b), such authority is not without significant limits. The Board must exercise its powers under Section 5(b) within the scope of the purposes Congress sought to achieve as reflected by the relevant legislative history and other appropriate aids to construction. The Board may not create policies that are outside the purposes of the laws it administers. See *Bankers Trust*, 104 S. Ct. at 2983. In the instant case there is no question that the Board properly carried out the purposes of the BHC Act, and therefore the Board's regulation was within its statutory authority.

Act, 15 U.S.C. § 1064 ("TILA"), which, in language similar to Section 5(b), directed the Board to prevent evasions of the governing statute. The issue was whether the Board exceeded its authority under TILA in adopting a rule which provided that all consumer transactions involving more than four installments would be subject to credit disclosure requirements. In upholding the authority of the Board to issue the rule, this Court said:

In addition to granting the Board the authority normally given to administrative agencies to promulgate regulations designed to "carry out the purposes of the Act," Congress specifically provided:

"These regulations may contain classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper . . . to prevent circumvention or evasion [of TILA], or to facilitate compliance therewith."

The Board was thereby empowered to define such classifications as were reasonably necessary to insure that the objectives of the Act were fulfilled, *no matter what adroit or unscrupulous practices were employed by those extending credit to consumers.* [411 U.S. at 361-62, 365-66 (emphasis added).]

In light of this Court's decision in *Mourning*, the Tenth Circuit was patently wrong in holding that "[t]he authority of the Board under the Act is to be exercised in a restricted area . . . limit[ed] . . . basically to anticompetitive considerations."⁵⁸ As discussed above, Congress authorized the Board under the BHC Act to deal with broad issues of geography, concentration of banking resources and the relationship of banking and commerce.⁵⁹ Congress clearly intended, and expressly provided in Section 5(b), that the Board would have broad authority

⁵⁸ *Dimension*, 744 F.2d at 1408, App. 12a.

⁵⁹ See Argument, Part I(A)(1), *supra*.

not only to implement the BHC Act but also to prevent, in the words of *Mourning*, "adroit and unscrupulous practices" from evading its purposes.⁶⁰

The Third and Eleventh Circuit Courts of Appeal have recently dealt with the authority of the Board under Section 5(b) of the BHC Act. Each court determined, contrary to the Tenth Circuit, that the Board has broad authority to act where the purposes of the BHC Act are being evaded.

In *Wilshire Oil Co.*, the Third Circuit upheld a cease and desist order issued by the Board against Wilshire on the ground that its subsidiary, the Trust Company of New Jersey ("TCNJ"), was a "bank" whose ownership by a nonbanking entity such as Wilshire was prohibited under the BHC Act. Wilshire argued that TCNJ had reserved the right to require prior notice of withdrawals from its transaction accounts (although TCNJ stated that it did not intend to exercise such right), and therefore was not a "bank" because it did not accept "demand deposits." The Board rejected Wilshire's argument and ordered Wilshire to divest itself of TCNJ.

The Third Circuit held that the Board had properly exercised its power under Section 5(b) to prevent Wilshire's clear evasion of the BHC Act's purposes:

Congress specifically instructed the Board to look at the purposes of the BHC Act in administering its terms. . . . Congress enacted § 5(b) as a catch-all, to cover any other evasions attempted through activ-

⁶⁰ The Senate committee report on the BHC Act as enacted in 1956 confirms that Congress intended to "centralize[] Federal administrative control under the [Act] in the Board," and that Section 5(b) would empower the Board "to issue appropriate regulations and orders in order to carry out the purposes of the [Act] and to prevent evasion of its provisions." S. Rep. No. 1095, *supra* note 19, [1956] U.S. Code Cong. & Ad. News at 2495-96.

ity conforming to the letter, but not the spirit, of the statute.

Because we approve the Board's finding that the reservation of the right to advance notice served no banking purpose, but was made merely to withdraw TCNJ from the coverage of the BHC Act, we accept the Board's order as necessary to "prevent evasion" of the Act.⁶¹

Similarly, in *Florida Dept. of Banking*, the Eleventh Circuit held that the Board should have denied an application by a New York bank holding company to establish a deposit-taking nonbank bank in Florida without Florida's permission, because the application represented a clear evasion of the purpose of the Douglas Amendment:

We hold that the Board should have used its power under § 5(b), 12 U.S.C. § 1844(b), to prevent evasion by U.S. Trust of the fundamental purposes of the Act. . . . The Board is Congress' custodian of the Act. In that capacity, it is charged with insuring compliance with Congress' goals even when Congress muddies the waters.⁶²

Thus, Section 5(b) charges the Board with the affirmative duty of preventing evasions of the BHC Act. Where, as here, the Board has determined that there is an evasion, it is not only empowered but compelled to halt such evasion in whatever form it may take, even though the proposed activity may conform to the literal language of the statute.⁶³

⁶¹ 668 F.2d at 738 and n.13 (emphasis added).

⁶² 760 F.2d at 1143-44 (emphasis added).

⁶³ While the revisions to Regulation Y are an appropriate response to attempts to circumvent the BHC Act, they do not address or resolve all the circumstances by which the Act may be evaded. Thus, to the extent that creative minds of businessmen and their lawyers devise schemes that, while technically conforming to the literal

As in *Wilshire*, the instant matter is of exceptional importance because the definition of "bank" in the BHC Act is key to the regulation of the banking industry. To eliminate by judicial edict the Board's flexibility to expand this definition would significantly impair the Board's ability to close unintended loopholes in the Act and in its own interpretations of the Act.

B. The Board's Definitions of Demand Deposits and Commercial Loans Were Within Its Authority Under Section 5(b) and Should Be Upheld

As already shown, the Board's definitions of "demand deposits" and "commercial loans" are well within the scope of its authority, especially when confronted with a situation presenting significant potential for undermining the purposes of a statute it is charged to administer. The court below asserted that by revising those definitions the Board had impermissibly expanded its jurisdiction. Such, however, was not the case. The Board was simply responding to its mandate under Section 5(b) to prevent serious evasions of the BHC Act.

Indeed, the Tenth Circuit recognized the problems with the definitions in Section 2(c), caused by rapidly developing conditions in the financial markets. 744 F.2d at 1407, 1410, App. 10a, 17a. Surely this recognition supports the Board's position as to the great potential for evasions of its jurisdiction by nonbank banks and the serious consequences of such evasions.

The Court below put great emphasis on the Board's earlier acquiescence in money market transactions that would be prohibited to nonbank banks under the Board's revised definition of "commercial loans." The Board determined, however, that money market activities engaged in on a small scale, and by a small number of institutions,

language of the law, in effect evade its purposes, Section 5(b) clearly authorizes and requires the Board to prevent such evasions. See *Florida Dept. of Banking*, 760 F.2d at 1143-44.

did not have any significant impact on the Board's jurisdiction or subvert the purposes of the BHC Act. When, however, these activities grew to the point where they *did* interfere with the duties of the Board and the purposes of the BHC Act, then Section 5(b) not only authorized but required the Board to respond to these changed circumstances by revising its regulation.⁶⁴

Although the court below did not challenge the Board's determination that the unregulated growth of nonbank banks threatened to "undermine the system of bank holding company regulation as a whole,"⁶⁵ the court expressed concern that the Board had made a "complete change" in its definitions. 744 F.2d at 1406, App. 9a. As already noted, however, the revisions to the regulation were not radically inconsistent with prior Board positions. Even if they were, the Board had the discretion to review and revise its interpretations in the light of changing circumstances.⁶⁶ This Court has in fact upheld a complete change in agency position where the agency amended its regulations to ensure compliance with the overall intent of the governing statute.⁶⁷

Congress has invested the Board with preeminent authority to regulate bank holding companies and to carry

⁶⁴ See notes 51-54, *supra*, and accompanying text. Respondents in *Mourning* argued, much as the Tenth Circuit held here, that because of specific enumerations contained in the statute the Board's rule-making authority was restricted. See 744 F.2d at 1408-09, App. 12a-15a. This Court rejected that argument, saying: "To accept respondent's argument would undermine the flexibility sought in vesting broad rule-making authority in an administrative agency." 411 U.S. at 372.

⁶⁵ Board Appendix A, 49 Fed. Reg. at 835, App. 27a.

⁶⁶ See notes 53-54, *supra*, and accompanying text.

⁶⁷ In *American Trucking Ass'n v. United States*, 344 U.S. 298, 314 (1952), this Court said that "[t]he mere fact that a contrary position was taken," did not prevent an agency from subsequently promulgating a regulation.

out the purposes of the BHC Act.⁶⁸ The Board therefore has the requisite authority and expertise to promulgate rules which address the complex and changing nature of the banking industry while preventing evasions of the BHC Act.

This Court has often recognized the Board's broad authority and expertise,⁶⁹ and has accordingly held that "substantial deference" must be given to the Board "whenever its interpretation provides a reasonable construction of the statutory language and is consistent with legislative intent."⁷⁰ In this case, it is clear that the Board's definition of "bank" represents a reasonable interpretation of Section 2(c) and is faithful to the intent and purposes of the BHC Act. Therefore, the Board's regulation should be upheld.

⁶⁸ Despite the Tenth Circuit's reliance upon the fact that the FDIC and the Comptroller of the Currency had disagreed with the Board's expanded definition of "commercial loans" (744 F.2d at 1406, 1408, 1410, App. 7a-8a, 12a-17a), the views of those agencies have no legal effect in this case. This Court has repeatedly held that the Board's authority to administer and interpret the BHC Act is "paramount" and overrides the views of any other federal banking agency. *Bd. of Governors of Fed. Res. Sys. v. First Lincolnwood Corp.*, 439 U.S. 234, 250 (1978); *Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 419-20 (1965).

⁶⁹ "Not only because Congress has committed the system's operation to their hands, but also because the system itself is a highly specialized and technical one, requiring expert and coordinated management in all its phases, I think their judgment should be conclusive upon any matter which, like this one, is open to reasonable difference of opinion. Their specialized experience gives them an advantage judges cannot possibly have, not only in dealing with the problems raised for their discretion by the system's working, but also in ascertaining the meaning Congress had in mind in prescribing the standards by which they should administer it." *Investment Co. Inst. v. Bd. of Governors of Fed. Res. Sys.*, 450 U.S. 46, 56-57 n.21 (1981), quoting *Bd. of Governors v. Agnew*, 329 U.S. 441, 450 (1946) (Rutledge, J., concurring). See also *Schwab*, 104 S. Ct. at 3009.

⁷⁰ *Schwab*, 104 S. Ct. at 3009.

CONCLUSION

For the reasons set forth above, the decision of the court below should be reversed.

Respectfully submitted,

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